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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 536

THOMAS C. KEININGHAM, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Thomas C. Keiningham, respectfully prays for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia, entered on September 18, 1962, affirming the judgment of the District Court of the United States for the District of Columbia.

THE OPINION BELOW

The opinion of the United States District Court of Appeals for the District of Columbia has not yet been reported. The opinion has been printed in the Appendix.

JURISDICTION

Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code (28 U.S.C.A., Sec. 1254).

QUESTIONS PRESENTED

I.

Whether it was error for the trial court to hold that a police officer has the right to interrogate a person not charged with a crime and where the officer is not investigating a crime.

II.

Whether it was error for the trial court to hold that the officer has a right to seize the brief case of petitioner, where there was no warrant for his arrest and where petitioner had committed no offense in the officer's presence.

STATUTE INVOLVED

Amendment IV—Constitution of The United States

Searches and Seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 11, 1961, petitioner alighted from a taxicab carrying a briefcase, in the afternoon, in the 700 block of Twelfth Street, N.W., Washington, D. C. (JA 5). Officer Layton and petitioner saw each other as petitioner departed the taxicab. (JA 5). Each was known to the other. Petitioner stood in a doorway, and the officer also stood in a doorway a short distance away. (JA 5). After a short period of time, the officer approached petitioner and a conversation ensued. (JA 7). The briefcase had been placed on the ground beside him by the petitioner. The officer inquired as to what was in the briefcase and the petitioner denied that it was

his. (JA 7). After further conversation the officer opened the briefcase and found incriminating evidence therein. (JA 8). As a result, petitioner was convicted of operating a lottery.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit conflicts with applicable decisions of that court, as well as those of the Supreme Court of The United States.

The Appellate Court has sanctioned the confronting of persons on the street, where police had knowledge that a crime had been committed and were investigating that crime. See *Campbell* v. *United States,* 289 F 2d, 775; *Ellis* v. *United States,* 264 F 2d, 372; *Green* v. *United States,* 259 F 2d 180; *Lee* v. *United States,* 221 F 2d, 29, and *Ellison* v. *United States,* 206 F 2d, 476.

In the instant case there had been no information imparted to the officer that a crime had been committed or was about to be committed. The petitioner was not conducting himself in a manner which would give rise to inquiry, nor had he committed an offense in the officer's presence. There was no warrant of arrest. (JA 9).

The circumstances of confronting the petitioner by the officer amounted to an arrest. *Henry* v. *United States,* 361 U.S. 98, 28 LW 4015, and *Rios* v. *United States,* 364 U.S. 253, 4 L ed 2d, 1688, support petitioner's position. The conduct of the officer in the instant case amounted to an arrest at common law, under the present British rule, and the case law of the Supreme Court of The United States.

As regards an alleged "invitation" extended to the officer to look in the briefcase, circumstances such as these were condemned by the same appellate court in *Judd* v. *United States,* 190 F 2d, 649, and *Higgins* v. *United States,* 209 F 2d, 819.

On July 19, 1962, the Court of Appeals dismissed this case as "frivolous", and on September 18, 1962, denied a petition for rehearing en banc. The Court of Appeals referred in its opinion to "abandonment in the presence of the officer." If the placing of the briefcase at his side was "abandonment", the same court held in *Work* v. *United States*, 100 U. S. App. D.C., 237, that the placing of materials in a trash can was not.

Petitioner respectfully represents that opinions of the Supreme Court of The United States cited herein, support his position that the conduct of the officer amounted to an arrest which failed to have for its basis either a warrant or probable cause. He further respectfully represents that the holding of the appellate court was a departure from its prior opinions regarding arrest and confrontation, and that petitioner's rights under the Constitution of The United States were violated.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH D. WOOD
401 Third Street, N.W.
Washington, D. C.
Attorney for Petitioner

APPENDIX

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16981

THOMAS C. KEININGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided July 19, 1962

Mr. Kenneth D. Wood for appellant.

Mr. William C. Weitzel, Jr., Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Nathan J. Paulson* and *Frederick G. Smithson*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. John R. Schmertz, Jr.*, Assistant United States Attorney, also entered an appearance for appellee.

Before WILBUR K. MILLER, *Chief Judge*, and BURGER and WRIGHT, *Circuit Judges*.

PER CURIAM: This is a paid appeal from judgment of conviction after trial before Judge Youngdahl without a jury. Our disposition of the case makes it important to

relate the facts and circumstances, particularly in view of the observations in the opinion in *Coppedge* v. *United States*, 369 U.S. 438 (1962).[1]

The District Judge's memorandum opinion contains his finding of facts:

> The pertinent facts in this case are as follows: At approximately 2:35 P.M. on December 11, 1961, Deputy Chief John Layton of the Gambling Squad, Metropolitan Police Department, had occasion to be on the 700 block of 12th Street, N.W. in the District of Columbia. At that time he observed defendant Keiningham alighting from a cab together with another individual whose identity is unknown. Defendant carried a rather large brown briefcase. Keiningham and Layton passed close to each other. Layton testified that Keiningham saw him at that point. The police officer had had previous professional contacts with the defendant and knew him as a frequent violator of the District's gaming laws. Layton proceeded up the street but stopped and looked back at the defendant. Keiningham had now situated himself between the show windows of a book store; the briefcase was no longer in his hand. Layton walked back toward the defendant and observed that the briefcase had been placed on the public sidewalk several feet from the defendant. As Layton approached Keiningham, the following conversation ensued:
>
> Layton: "Hello Tom".
>
> Keiningham: "Hello Inspector."
>
> Layton: "What are you carrying?"
>
> Keiningham then patted his coat and pants pockets and said, "Nothing".
>
> . . . .
>
> Layton: "Hadn't you just carried that [briefcase] from the cab?"

[1] Until recently there was no occasion for this court to dismiss paid appeals as "frivolous" since there was no occasion for us to examine into the facts or merits until all briefs and other papers were filed and the case was argued. We usually dispose of such a case with a very short per curiam memorandum opinion.

Keiningham: "No, I don't know anything about the briefcase."

Layton: "Do you have any idea what it contains?"

Keiningham: "No, I don't know anything about it."

Layton then remarked that it was careless to leave something like that around and that it might contain valuables.

Keiningham: "I have no idea, why don't you examine it".

Layton then looked inside the briefcase and observed a quantity of money as well as slips and records readily identifiable as "numbers" paraphernalia. He then placed defendant under arrest; the time was 2:40 P.M.

It was stipulated that the brief case contained slips, notations and receipts used in a numbers lottery and testimony showed 797 slips representing $4201.99 of play and that these papers showed 104 codes indicating 104 individual "writers." The arresting officer testified that he did not arrest or even touch appellant until after he observed the incriminating contents of the briefcase. Appellant who did not testify, now urges that he was under arrest as soon as the officer asked a question about the briefcase.

Against the background of these undisputed facts it is clear (1) that the circumstances warranted the officer in making some inquiry about the ownership of the briefcase which was being abandoned in the presence of the officer, (2) that no arrest was made when the questions were asked, (3) that in view of appellant's denial of ownership or knowledge of the briefcase, which the officer had seen in his hand moments before, the officer's personal observations warranted, if not compelled, further inquiry, (4) that, in any event, the officer was justified in accepting appellant's suggestion that he "examine it," (5) that the officer's observation of the contents disclosed commission of a crime, and appellant's possession of those materials implicated him directly and provided abundant probable cause for immediate arrest at that point. *Campbell* v.

United States, —— U.S.App.D.C. ——, 289 F.2d 775 (1961); *Dixon* v. *United States,* 111 U.S.App.D.C. 305, 296 F.2d 427 (1961); *Goldsmith* v. *United States,* 107 U.S.App. D.C. 305, at 314, 277 F.2d 335, at 344, *cert. denied,* 364 U.S. 863 (1960); *Ellis* v. *United States,* 105 U.S.App.D.C. 86, 264 F.2d 372, *cert. denied,* 359 U.S. 998 (1959); *Green* v. *United States,* 104 U.S. App.D.C. 23, 259 F.2d 180 (1958), *cert. denied,* 359 U.S. 917 (1959); *Lee* v. *United States,* 95 U.S.App.D.C. 156, 221 F.2d 29 (1954); *Brooks* v. *United States,* 159 A.2d 876 (D.C. Mun. App. 1960); *Dickerson* v. *United States,* 120 A.2d 588 (D.C. Mun. App. 1956); see *Nash* v. *United States,* No. 16015, D.C. Cir., *aff'd by order,* Feb. 14, 1961, but see facts disclosed in Joint Appendix.

On this record the appeal should be dismissed as frivolous and an order to that end will be entered.

Appeal dismissed as frivolous.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,981

SEPTEMBER TERM, 1962

District Court Criminal No. 35-62

THOMAS C. KEININGHAM, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: Wilbur K. Miller, Chief Judge, Edgerton, Bazelon, Fahy, Washington, Danaher, Bastian, Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court that the petition be, and it is hereby, denied.

Per Curiam.

Dated:

Bazelon, Circuit Judge: This paid appeal from a judgment of conviction was fully briefed and argued before a division of this court which considered the issues presented and entered an opinion finding them to be without merit. Instead

of following the usual course of affirming the judgment of conviction, however, the court dismissed the appeal as frivolous.

Since the merits of the case were fully briefed, argued, and considered by the court, I see no significant difference in the result, as it affects appellant, between dismissal and affirmance. The critical fact is that appellant has had his day in court. If he had not, then wholly different consideration would apply. See *Coppedge* v. *United States*.[1]

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[1] "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. The only requirements a defendant must meet for perfecting his appeal are those expressed as time limitations within which various procedural steps must be completed." 369 U.S. 438, 441-42 (1962).

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CITATIONS

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Work v. *United States*, 243 F. 2d 660	5

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QUESTION PRESENTED

Whether the contents of a brief case, which petitioner had dropped on the street after seeing a police officer and which he said to the officer did not belong to him, were properly admitted in evidence.

STATEMENT

Petitioner was indicted in the District Court for the District of Columbia for carrying on a lottery and having receipts and other papers used in a lottery, in violation of 22 D.C. Code 1501 and 1502 (R. 1). He moved for the suppression of all evidence which he alleged was seized from him on the day he was arrested. This motion was denied (R. 2). Having waived his right to a trial by jury (R. 2–3), petitioner was convicted on both counts by the trial judge and sentenced to concurrent terms of imprisonment of 4 to 12 months on count one and one year on count two (R. 14). After briefing and oral argument, the court of appeals dismissed as frivolous petitioner's appeal claiming that illegally obtained evidence was introduced at his trial (R. 19–20).

The pertinent facts concerning the seizure of the evidence are as follows:

About 2:35 p.m. on December 11, 1961, Deputy Chief Thomas Layton saw petitioner, a person whom he knew to be a frequent violator of the gambling laws of the District of Columbia, leaving a cab in the 700 block of 12th Street, N.W., Washington, D.C. Petitioner was accompanied by a person who was unknown to Chief Layton and was carrying a large brown briefcase. Petitioner and Chief Layton passed

close to each other and at this point petitioner saw Chief Layton (R. 5). When Layton looked back at petitioner, he noted that petitioner stood between the shop windows of a book store and was no longer carrying the briefcase. The officer saw the briefcase on the sidewalk within a few feet of petitioner (R. 5–6). The officer approached petitioner and after greeting him asked what he was carrying. Petitioner patted his pockets and said that he was not carrying anything. Asked whether he had not just carried the briefcase which was now on the sidewalk, petitioner said that he knew nothing about it (R. 6–7). When asked if he had any idea as to its contents, he said "no" (R. 7). The officer remarked that it was careless to leave something like that around and that it might contain something of value. Petitioner said that he had no idea of its contents and asked "why don't you examine it" (R. 7–8). The officer did so, and found money, lottery slips, and numbers paraphernalia in it. At this point he arrested petitioner on the lottery charges. The contents of the briefcase were introduced in evidence against petitioner.

ARGUMENT

The courts below properly found no merit in petitioner's attack on the admissibility of the contents of the briefcase. Petitioner left his briefcase on the sidewalk and moved away from it before the police officer took any action whatsoever. After seeing petitioner, first with the briefcase in his hands and then without it, and noticing the briefcase a few feet away

on the sidewalk, the officer had good reason to make inquiry of petitioner. Such an inquiry by a police officer on the street is not an arrest. *Green* v. *United States,* 259 F. 2d 180, 181 (C.A. D.C.), certiorari denied, 359 U.S. 917; see *Weathersbee* v. *United States,* 62 F. 2d 822 (C.A. 5), certiorari denied, 289 U.S. 737; *Poulas* v. *United States,* 95 F. 2d 412, 413 (C.A. 9). Neither *Henry* v. *United States,* 361 U.S. 98, nor *Rios* v. *United States,* 364 U.S. 253, on which petitioner relies hold to the contrary. In *Henry* the government, having conceded below that the stopping of the vehicle amounted to an arrest, did not argue the point and the Court limited its decision to the facts of the particular case. 361 U.S. at 103. In *Rios,* "the Government argue[d] that the policemen approached the standing taxi only for the purpose of routine interrogation," and that this did not constitute an arrest. 364 U.S. at 262. The Court sent the case back for a determination as to precisely when the officer had made the arrest. The decision thus impliedly holds that the mere approach of the officer to make an inquiry does not in itself constitute an arrest.

After petitioner denied ownership of the briefcase or knowledge of its contents, the police had the right to consider it as abandoned property and examine it, regardless of any consent by petitioner. See *Hester* v. *United States,* 265 U.S. 57; *Haerr* v. *United States,* 240 F. 2d 533, 535 (C.A. 5); *Lee* v. *United States,* 221 F. 2d 29, 30 (C.A. D.C.). In any event, petitioner

consented to the search of the briefcase. Indeed, he went further and suggested to the officer that he examine the contents of the briefcase. This statement, made in the open street, when no move had been made to arrest petitioner, cannot be equated to the situation in the cases relied upon by petitioner in which courts have ruled involuntary a consent to search a home given after arrest (*Judd* v. *United States,* 190 F. 2d 649 (C.A. D.C.)), or where a defendant could reasonably consider himself arrested (*Higgins* v. *United States,* 209 F. 2d 819 (C.A. D.C.)).[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

NOVEMBER 1962.

[1] In *Work* v. *United States*, 243 F. 2d 660 (C.A. D.C.), on which petitioner also relies, the defendant hid narcotics in a trash can immediately outside her house after officers had illegally entered the house. She made no statement even suggesting that she consented to the search. The court of appeals held that the narcotics had been hidden, not abandoned. Here, in contrast, the police officer had taken no action at all when petitioner left his briefcase on the sidewalk. His subsequent inquiry was, as we have seen, entirely legal and petitioner himself suggested that the search of the briefcase be made.

U.S. GOVERNMENT PRINTING OFFICE: 1962